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IN THE

# Supreme Court of the United States

Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1978
NO. 78-139

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

and

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF OF PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION AND PURSE SEINE VESSEL OWNERS ASSOCIATION

Office & P.O. Address:
3920 Bank of California Center
Seattle, WA 98164

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Purse Seine Vessel Owners Association

3300 Seattle-First National Bank Bldg.
Seattle, WA 98154

CHARLES E. YATES
MORIARTY, LONG, MIKKELBORG & BROZ
Attorneys for Puget Sound Gillnetters Association

CRAFTSMAN PRESS II WORD PROCESSING, SEATTLE

## TABLE OF CONTENTS


Page

Argument In Reply. . . . . 1

1. Issues Have Not Previously Been Settled . . . . . 1

2. Neither the Doctrine of "Res Judicata" nor "Law of the Case" Would Appear to Prevent This Court From Reviewing the Treaties . . . . . 9

A. Res judicata. . . . . 9

B. Law of the case . . . . . .11

Conclusion . . . . . .13


## TABLES OF AUTHORITY

### Tables of Cases


Antoine v. Washington, 420 U.S. 194 (1975). . . . . 7

Burnet v. J. Rogers Flannery & Co., 286 U.S. 524 (1932) . . . . . .11

Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II). . . . . 5,7

Falk v. Brennan, 414 U.S. 190 (1973) . . . . . .12

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251 (1915) . . . . . .12

Hughes Tool Co. v. TWA, 409 U.S. 363 n. 1 (1973). . . . . 11,12

Mercer v. Theriot, 377 U.S. 152 (1964) . . . . .11

Messinger v. Anderson, 225 U.S. 436 (1912) . . .11

Panama R.R. v. Napier Shipping Co., 166 U.S. 282 (1897) . . . . . .11

Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977) . . . . . .12

Porter Co. v. NLRB, 397 U.S.99 (1970) . . . . .12

Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (Puyallup III). . . . . 6,7

Reece v. Georgia, 350 U.S. 85 (1955) . . . . 11,12

Riley v. Phillips Petroleum Co., 427 F.2d 19 (10th Cir. 1970) . . . . . .10

Scott v. United States, 46 U.S.L.W. 4433 (U.S. May 15, 1978) . . . . . .12

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) . . . . . .11

White v. Higgins, 116 F.2d 312 (1st Cir. (1940). . . . . 11,12

Zdanok v. Glidden Co., 327 F.2d 944 n. 9 (2d Cir. 1940) . . . . . .11

Textbooks

1B J. Moore, Federal Practice, ¶ 0.404 (2d Ed. 1975) . . . . . .12

9 J. Moore, Federal Practice ¶ 110.25[2] (2d Ed. 1975) . . . . . .12

Other Authority

Fed. R. Civ. P. (8)(c) . . . . . 9

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## ARGUMENT IN REPLY

### 1. Issues Have Not Previously Been Settled

Although the United States urges this Court to review the issues raised in the cases below, with

which we agree, the United States nonetheless suggests that those issues have been "long since settled" (U.S. Br., p. 19). With this latter suggestion, we disagree; these issues have never been settled by this Court.

The United States correctly states the central issue (U.S. Br., p. 21):

> The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the "right of taking fish at all usual and accustomed grounds and stations. . . . in common with" other Washington citizens (Pet. App. A-131).

Judge Boldt has construed this right to fish "in common with" other citizens to mean that off the reservation at their usual and accustomed fishing grounds, which the Judge has found to include virtually every body of water in Washington state except some small lakes, any number of Indians may take all the harvestable fish they want for ceremonial and subsistence purposes, which can be a substantial number,[1] plus fifty per cent of the

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[1] In the 1978 fishing season, treaty Indians were authorized to harvest for ceremonial and subsistence purposes 52,149 chinook, coho and chum salmon out of 1,531,000 harvestable salmon (includes treaty Indian "on reservation" harvest). In Final Decision No. 1, Judge Boldt made it clear that the tribes, themselves, shall make the sole determination of "the number or quantity of fish they intend and expect to take at their usual and accustomed fishing grounds for traditional ceremonial needs and for consumption by tribal members and their families." 384 F. Supp. at 417.



rest. This Court has never construed the treaties to require such an allocation to Indians as a matter of law in every case. Such a construction would permit one remaining treaty Indian fisherman of his tribe to take all the fish he wants on the reservation (none of which need be considered for ceremonial or subsistence purposes), then go to his usual and accustomed fishing grounds off the reservation and take all the fish he wants for ceremonial and subsistence purposes, and then take fifty per cent of the rest; notwithstanding that there may be thousands of non-treaty fishermen relegated to harvest less than fifty per cent. It is a far-reaching and unprecedented construction of the phrase "in common with," which would entitle one Indian to a greater number of fish than the

total available to thousands of non-treaty fishermen combined. Yet the United States contends (U.S. Br., p. 21) that this interpretation is "an appropriate culmination of the unbroken line of decisions by this Court" cited in its brief. Let us examine those decisions.

In United States v. Winans, 198 U.S. 371 (1905), having acknowledged that the state could regulate the Indian's treaty right to fish, this Court held that such Indian could, however, cross private property to reach his usual and accustomed fishing grounds.

Next, in Tulee v. Washington, 315 U.S. 681 (1942), having again acknowledged that the state could regulate the time and manner of treaty Indian fishing for conservation purposes, this Court held that a treaty Indian, however, could not be compelled to buy a fishing license to fish at his usual and accustomed fishing grounds.

Next, in Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (Puyallup I), this Court held that the state's conservation regulations at an



Indian's usual and accustomed fishing grounds must meet appropriate standards and cannot discriminate against the Indian; however, the Court asserted (p. 403) that ". . . any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'. . . ."

But, notwithstanding that the treaties secured to the Indians the right to cross private property to reach their fishing grounds and to fish without a license and not be discriminated against, this Court has never held that the treaties entitle all Indians to a specific allocation of fish as a matter of law. In Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), this Court implicitly rejected any such specific allocation of fish by stating (p. 49):

> What formula should be employed is not for us to propose. There are many variables--the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used.

Judge Boldt took none of the foregoing factors into consideration when he held that, as a matter of law in every case, the treaty Indian was entitled to take more than fifty per cent of the harvestable fish (including ceremonial and subsistence fish). the Court of Appeals didn't even think the number of treaty fishermen was relevant; in the case at issue, it stated (p. 1128):

> Comparison between the number of treaty and non-treaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law.

In the recent case of Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (Puyallup III), this Court (i) rejected the Indians' claim to an exclusive right to take steelhead passing through their reservation, (ii) recognized that both treaty Indians and non-Indian citizens had fishing rights under the treaty to be shared in common, and (iii) affirmed the state court's allocation (pursuant to



the above quoted formula in Puyallup II of the 1975 natural (non-hatchery)[2] steelhead run to the Indians.[3]

In Antoine v. Washington, 420 U.S. 194 (1975), consistent with prior decisions, this Court held that Indian hunting rights on a portion of Indian reservation ceded to the United States were subject to state conservation regulations, but that such regulations must have "appropriate safeguards" and must not discriminate against the Indian.

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[2] Whether hatchery fish should always be excluded from the treaty right was not decided.

[3] Under Washington state law steelhead are a game (non-commercial) fish which can be taken only by hook and line. Since Indians traditionally fish only with nets, an accomodation was necessary in the Puyallup I, II and III cases to permit Indians to fish for steelhead with nets "in common with" non-Indians fishing with hook and line. The Boldt decision, however, deals mainly with salmon, which are taken commercially by net; therefore, a similar accomodation with a corresponding appropriate allocation for salmon runs each year would not necessarily be required in the cases at issue here in order to meet the "in common with" requirements. Another distinguishing feature in Puyallup III is that the Court was dealing with an alleged "on reservation" fishery.

There was, however, no holding that Indians were entitled to a specific allocation of game.

Article III of the Yakima Treaty, which reserves to the Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," also secures to them in the previous sentence "the right, in common with citizens of the United States, to travel upon all public highways." To be consistent, Judge Boldt's construction of "in common with" would entitle the Indians to more than fifty per cent of the use of all public highways and one Indian could theoretically block off at least half of any public highway in Washington state for his personal use. How can such a construction be allowed to stand, let alone be considered "long since settled."

There simply is no case where this Court has ever established an allocation rule such as the one established by Judge Boldt. We, therefore, urge this Court to review this issue along with all the corollary issues raised by the decisions below.



2. Neither the Doctrine of "Res Judicata" nor "Law of the Case" Would Appear to Prevent This Court From Reviewing the Treaties

We agree with the United States (U.S. Br., p. 22, n. 17) that "neither the doctrine of res judicata nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case."

A. Res judicata

Res judicata is a defense which must be affirmatively pleaded in the trial court, or else it is waived. See Fed. R. Civ. P. (8)(c). Here no party invoked res judicata when we challenged the district court's interpretation of the treaties or when the state challenged the expansion of Judge Boldt's orders. And given the Court of Appeals' extended treatment of the issue on the merits, that court can certainly not be said to have disposed of the treaty interpretation argument on res judicata grounds.

In addition, there is not a "final" judgment in this litigation that could have res judicata

effect. In United States v. Washington, the court of appeals ordered the case remanded to the district court "so that it may maintain continuing jurisdiction," 520 F.2d at 693, and the district court has done so through the issuance of numerous orders since its original opinion was filed. That is, of course, consistent with the general principle that where injunctive relief is granted, the litigation is not terminated since the court retains inherent power to modify its continuing equitable decree. See Riley v. Phillips Petroleum Co., 427 F.2d 19, 23 (10th Cir. 1970). It is those subsequent decrees, issued as part of the same litigation, that are the subject of the pending petitions to review the Ninth Circuit. The original litigation never became final for res judicata purposes. Accordingly, the doctrine of res judicata does not foreclose this Court from reviewing the correctness of the Ninth Circuit's or the Washington Supreme Court's decisions.



B. Law of the case

Nor does the "law of the case" doctrine pose a barrier to this Court's review of the treaty interpretation issue. Although the rulings of a state or federal appellate court consistute the "law of the case" for that court in the event of a second appeal, they are not binding on this Court, even though it may have denied a petition for certiorari from the first judgment of the Court of Appeals.[4] See, e.g., Mercer v. Theriot, 377 U.S. 152, 153-54 (1964); Reece v. Georgia, 350 U.S. 85, 87 (1955); Burnet v. J. Rogers Flannery & Co., 286 U.S. 524 (1932); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923); Messinger v. Anderson, 225 U.S. 436, 444 (1912); Panama R.R. v. Napier Shipping Co., 166 U.S. 282, 283-84 (1897). See also Zdanok v. Glidden Co., 327 F.2d 944, 951 n. 9 (2d Cir. 1964); White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940); 1B J.

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[4] Of course the denial of certiorari in United States v. Washington cannot be construed as a decision on the merits. Hughes Tool Co. v. TWA, 409 U.S. 363, 365 n. 1 (1973).

Moore Federal Practice ¶ 0.404 at 574 (2d Ed. 1975); 9 J. Moore, Federal Practice ¶ 110.25[2] at 275 (2d Ed. 1975). As this Court said in Reece v. Georgia:

> We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case.

350 U.S. at 87 (citations omitted). Under these principles the Court has on a number of occasions granted certiorari and decided issues that had been the subject of an earlier appellate court ruling which it had declined to review. See, e.g., Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977); Hughes Tool Co. v. TWA, supra; Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 257-58 (1915); Scott v. United States, 46 U.S.L.W. 4433 (U.S. May 15, 1978); Falk v. Brennan, 414 U.S. 190 (1973); and Porter Co. v. NLRB, 397 U.S. 99 (1970). Accordingly, whether or not the Ninth Circuit panel considered itself bound by the "law of the case" doctrine, the door is open for this



Court to consider the treaty issue in these latest proceedings.

## CONCLUSION

For the foregoing reasons, petitioners herein urge this Court to grant writs of certiorari to review the opinions of the Ninth Circuit Court of Appeals and the Washington State Supreme Court, and the Findings of Fact, Conclusions of Law and Injunction issued in 1978 by the district court.

Respectfully submitted,

JOSEPH T. MIJICH/JOHN P. WORLD

Attorneys for Petitioner
Purse Seine Vessel Owners
Association

CHARLES E. YATES
MORIARTY, LONG, MIKKELBORG
& BROZ

Attorneys for Petitioner
Puget Sound Gillnetters
Association